No. 90-1498

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In The

Supreme Court of the United States

October Term, 1990

INDIAN CHILD WELFARE COORDINATOR OF THE JUVENILE COURT OF THE CHEYENNE RIVER SIOUX TRIBE, ET AL.

Petitioners,

v.

CHESTER COUNTY DEPARTMENT OF SOCIAL SERVICES, ET AL.

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of South Carolina

PETITION FOR WRIT OF CERTIORARI

*Scott B. McElroy
Mark C. Van Norman
*Counsel of Record
Greene, Meyer & McElroy, P.C.
1007 Pearl Suite 240
Boulder, Colorado 80302
(303) 442-2021

Steven C. Emery
Tribal Attorney
Cheyenne River Sioux Tribe
P.O. Box 590
Eagle Butte, South Dakota 57625
(605) 964-4155

Counsel for Petitioner, Indian Child Welfare Coordinator of the Juvenile Court of the Cheyenne River Sioux Tribe

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1) Whether a state appellate court, with no more than a cold record before it, violates the due process clause of the Fourteenth Amendment of the Constitution of the United States and the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 *et seq.* by striking a trial court's findings of fact based on the weight and credibility of witnesses and substituting its own findings concerning the existence of "good cause" to deny transfer of an Indian child custody case to tribal court.

2) Whether a state appellate court may defeat the Congressional preference for tribal court jurisdiction by using the Indian placement preference of the Act to establish a judicial presumption in favor of state court jurisdiction solely for the benefit of non-Indian foster parents in Indian child custody cases.

3) Whether a state appellate court may ignore this Court's explication of the Congressional mandate of the Indian Child Welfare Act of 1978 in *Mississippi Band of Choctaws v. Holyfield*, ___ U.S. ___, 109 S. Ct. 1597 (1989) by failing to even consider the obligation to protect the federal rights of the children as Indians, the rights of the Indian parent and the rights of the children's tribe in determining whether there is "good cause" to deny tribal court jurisdiction in an Indian child custody case.

4) Whether by mere speculation as to the witnesses that state social services and the non-Indian foster parents would call in an Indian child custody case, a state

QUESTIONS PRESENTED – Continued

appellate court may avoid this Court's holding in *Mississippi Band of Choctaws v. Holyfield, supra,* that tribal jurisdiction created by the Indian Child Welfare Act of 1978 is determined by federal law standards.

LIST OF PARTIES

The Parties to the Proceedings Below Were:

Petitioner Indian Child Welfare Coordinator of the Juvenile Court of the Cheyenne River Sioux Tribe for the Cheyenne River Sioux Tribe, and the natural parents, Joe L. Coleman and Phyllis Coleman, in their own behalf. Mr. and Mrs. Coleman support, but have not officially joined, this petition for writ of certiorari because they are not presently represented by counsel.

Respondents Chester County Department of Social Services and Richard Steele, Guardian Ad Litem, for the Indian children BJM, TM, HC and JC. It is noteworthy that the non-Indian foster parents were never actual parties to this action.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING WRIT OF CERTIORARI 9

I. THE SOUTH CAROLINA SUPREME COURT HAS JEOPARDIZED THE ABILITY OF INDIAN TRIBES TO PROTECT THEIR CHILDREN BY IGNORING THE CLEAR CONGRESSIONAL MANDATE OF THE INDIAN CHILD WELFARE ACT, 25 U.S.C. § 1901, *ET SEQ.*, AND THIS COURT'S TEACHING IN *MISSISSIPPI BAND OF CHOCTAWS V. HOLYFIELD*, ___ U.S. ___, 109 S. CT. 1597 (1989) 9

A. Introduction 9

1) The State Supreme Court Denied the Indian Parties Due Process of Law By Making Substitute Findings of Fact Without Hearing the Live Testimony 11

2) The State Supreme Court Disregarded Congress' Mandate in Favor of Tribal Jurisdiction and Created a *De Facto* Preference For State Court Jurisdiction Solely for the Benefit of Non-Indian Foster Parents 15

3) The State Supreme Court Refused to Consider the Rights of the Indian Children as Indians, the Indian Parent and the Indian Tribe 19

TABLE OF CONTENTS – Continued

Page

a. Rehabilitation of the Parents..... 20

b. Protection of the Indian Children's Relations with their Tribe and the Tribe's Contacts with its Children .. 21

c. Tribal Social and Cultural Standards 22

4) The State Supreme Court Completely Ignored the *Holyfield* Mandate that Presumptive Tribal Jurisdiction Must be Measured by Federal Law Standards ... 23

a. Convenience of the Parties 24

b. Convenience of the Witnesses 25

c. The Interests of Justice 27

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

American Standard, Inc. v. Bendix Corp., 487 F. Supp. 254, 263 (D.C. Mo. 1980) 27

Anonymous v. F.D.I.C., 617 F. Supp. 509, 512 (D.D.C. 1985) 24

Construction Laborers v. Durry, 371 U.S. 542 (1963) 2

Davis v. Page, 442 F. Supp. 258, 263 (S.D. Fl. 1977) 11

Dutton v. County of Suffolk, 729 F.2d 903 (2d Cir. 1984) 5

Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) 24

In re Adoption of Holloway, 732 P.2d 962 (Utah 1986) 19

In re Appeal of Pima County Juvenile Action, 130 Ariz. 202, 204, 635 P.2d 187 (App. 1981) 19, 26

In re Ralston Purina Co., 726 F.2d 1002 (4th Cir. 1986) 26

Lassiter v. Department of Social Services, 452 U.S. 18 (1981) 15

Matter of M.E.M., 635 P.2d 1313 (Mont. 1981) 17

Matthews v. Elderidge, 424 U.S. 319 (1976) 15

Mercantile Nat. Bank v. Langdeau, 371 U.S. 555 (1963) 2

Mississippi Band of Choctaws v. Holyfield, ___ U.S. ___, 109 S. Ct. 1597 (1989) ..... *passim*

Morgan v. United States, 298 U.S. 468 (1936) 10, 12

Norwood v. Kirkpatrick, 349 U.S. 29 (1955) 23

Parsons v. Chesapeake & O.R. Co., 375 U.S. 71 (1963) 28

TABLE OF AUTHORITIES – Continued

Page

Solem v. Bartlett, 465 U.S. 463 (1984) 13

United States v. Raddatz, 447 U.S. 667 (1979) 11, 12, 14, 15

Wakefield v. Little Light, 276 Md. 333 A.2d 228 (1975) 11

STATUTES AND TREATIES

28 U.S.C. § 1257(a) 2

42 U.S.C. § 1983 5

28 U.S.C. § 1404(a) 24, 27

Indian Child Welfare Act of 1978, 25 U.S.C. § 1901, *et seq.* ..... *passim*

MISCELLANEOUS

C. Wright, A. Miller and E. Cooper, 15 Federal Practice and Procedure § 3841 24

Code of Professional Responsibility, DR 5-105 5

H. R. Rep. No. 95-1386, p. 22 (1978), *reprinted* in 1978 U.S. Code Cong. & Admin. News ..... *passim*

National Law Journal, Feb. 25, 1991 8

U.S. Const., art. XIV 11, 27

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OPINIONS BELOW

The December 10, 1990 opinion of the South Carolina Supreme Court denying transfer of the case to the tribal court is printed in the Appendix (App.) at App. 1. The April 5, 1989 opinion of the South Carolina Family Court granting transfer of the case to the tribal court is printed at App. 9. The September 26, 1988 opinion of the South Carolina Court of Appeals remanding the family court's earlier transfer order is printed at App. 25, and is

reported at 296 S.C. 355, 372 S.E.2d 912 (Ct. App. 1988). The November 10, 1986 opinion of the family court ordering transfer is printed at App. 31. The April 4, 1986 opinion of the state supreme court remanding the family court's first transfer order is printed at App. 36. The February 28, 1986 opinion of the family court transferring the case to South Dakota for placement of the children in accord with the Indian Child Welfare Act is printed at App. 38.

JURISDICTION

The judgment of the state supreme court denying the presumptive tribal court jurisdiction created by the Indian Child Welfare Act, 25 U.S.C. § 1911(b), was entered December 10, 1990, and the jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). *See, also, Mercantile Nat. Bank v. Langdeau*, 371 U.S. 555, 558 (1963); *Construction Laborers v. Durry*, 371 U.S. 342, 346 (1963).

STATEMENT OF THE CASE

This action involves the persistent refusal of the South Carolina appellate courts to recognize the Congressional mandate of the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 (the "ICWA" or the "Act") and this Court's decision in *Mississippi Band of Choctaws v. Holyfield*, ___ U.S. ___, 109 S. Ct. 1597 (1989). The South Carolina Family Court has tried three times to transfer this case to South Dakota to allow the Cheyenne River Sioux Tribe to determine the future of its own children,

and the South Carolina appellate courts have repeatedly intervened to preserve the placement of the Sioux Indian children with non-Indian foster parents.

Over seven years ago, the Chester County, South Carolina Department of Social Services ("social services") removed four Indian children from their home and "temporarily" placed them in separate non-Indian foster homes. The four children, BJM, TM, JC and HC, and their mother,[1] are members of the Cheyenne River Sioux Tribe of South Dakota. In May, 1984, after efforts to reunite the family began, the foster parents brought to light allegations of sexual abuse. In response, social services petitioned for termination of parental rights. In June, 1984, shortly after the Tribe was notified of the intent to terminate the Indian family's relations, *see* 25 U.S.C. § 1912, the Tribe requested transfer of the case to the Juvenile Court of the Cheyenne River Sioux Tribe (the "tribal court"), and the tribal court attempted to place all of the children

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[1] The children's mother, Phyllis Bald Eagle Coleman, is a full-blood Cheyenne River Sioux tribal member. BJM and TM are also full-blood Cheyenne River Sioux tribal members, by Ms. Coleman's first husband. JC and HC are Ms. Coleman's children by her second husband, Mr. Joe Coleman. He is black, and much was made of this at the transfer hearings. *E.g.*, October, 1986 Transcript ("10/86 Tr.") at 42, witness Mandell (JC has no "evidence of being identified with an Indian background, [but has] elements in speech that are like Blacks' speech"). That is, of course, irrelevant because JC and HC are tribal members. 25 U.S.C. § 1903(4).

Since November, 1983, BJM and TM have been placed with the same white foster parents. JC and HC have been placed four times, but they have been with the same black foster parents since 1985.

with their grandparents on the Cheyenne River Indian Reservation.

While a criminal investigation was pending, the family court declined to transfer the case to the tribal court. Although the extended Indian family was willing to care for the children and tribal foster care institutions were available, *see* 25 U.S.C. § 1915(b), the children were left with non-Indian foster parents. In April, 1985, the trial of the parents for child abuse ended in a mistrial when 11 of the 12 jurors voted for acquittal. The State dropped the criminal action.

The allegations of sexual abuse were considered in family court in February, 1986, and again, the Tribe requested transfer of the case to tribal court. The family court ordered the transfer of the children to the State of South Dakota Department of Social Services for placement "according to the policies established by the Indian Child Welfare Act of 1978." App. 44. The state supreme court remanded the case for reconsideration on April 14, 1986. After another hearing, the family court ordered the transfer of the case to the tribal court on November 10, 1986. App. 31.

The foster parents appealed and moved for a stay pending appeal, and the guardian ad litem[2] joined the

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[2] Since the beginning of this action, there has been a disturbing alliance between the foster parents and the guardian ad litem. At the October, 1986 hearing on the Tribe's transfer petition, the court held that the foster parents had no standing in the matter. The guardian's attorney offered to permit the foster parents' attorney to represent the guardian,

(Continued on following page)

foster parents' motion and appeal. The state court of appeals reversed, claiming that on the record before it, the court could not determine whether "good cause" existed to deny the transfer. The court of appeals directed the family court to reconsider the issue, and to address, *inter alia*, whether the "removal of the children" from the foster parents would be detrimental to their interests. App. 30.

On January 19 and 20, 1989, the family court held another hearing to reconsider the transfer issue, and in its written opinion of April 5, 1989, found, *inter alia*:

> 1) The natural *parents "reside on the* Cheyenne River Sioux *Reservation."* Family Court Finding ("F. Ct.") 21. "[P]arental rights have not been terminated and *the children could be reunited with their birth mother* and father or step-father as the case may be," F. Ct. 34, or "with an Indian family as opposed to the present situation where two of the children are placed with Black foster parents and two . . . with White foster parents."

(Continued from previous page)

but the family court rejected the offer based on the conflict of interest between the foster parents and the guardian. 10/86, Tr. 10-12.

Later, the guardian withdrew. When a new guardian was appointed, the state supreme court, over objection, appointed the foster parents' attorney as attorney for the guardian. The simultaneous representation is troubling because the non-Indian foster parents seek permanent custody of the children while the guardian has the responsibility to act solely for the interests of the children, including their interests as Indian children. *See, generally,* Code of Professional Responsibility, DR 5-105; *see, e.g., Dunton v. County of Suffolk,* 729 F.2d 903 (2d Cir. 1984). (Police officer denied fair trial where attorney simultaneously represented both the officer and the defendant county in 42 U.S.C. § 1983 action).

Family Court Summary ("F. Ct. Summ.") (Emphasis added.)

2) "All of the blood kin, with the exception of the paternal grandparents in North Carolina, are living in South Dakota. The Indian heritage, to which these children are entitled, is on the Sioux Indian Nation in the State of South Dakota. . . . *[N]othing remains in South Carolina except the children themselves.*" F. Ct. Summ. (Emphasis added.)

3) Although removal of the children from their foster placements would be "disruptive and adversely affect the children in the short term, [t]here is no basis to conclude . . . that removal and placement with the tribal community will be detrimental to the children in the long term." F. Ct. 40.

4) *"[T]he Tribe ha[s] resources available* . . . to provide the children with suitable counseling and therapy. . . . Social Services has not provided the children with any counseling or therapy to date." F. Ct. 36. (Emphasis added.)

5) *"The Tribal Court is well equipped* to deal with the difficult questions which surround the placement of these children." F. Ct. 37. In contrast, Social Services was unable to locate anyone who had knowledge of the "social and cultural standards of the Indian community in which the parent [and] the extended family resides," which must be applied in placing the children. F. Ct. 20. (Emphasis added.)

6) *"[T]he Tribe w[ill] cooperate in facilitating the participation of local witnesses* in the conduct of hearings before the Tribal Court through the use of trial depositions and other procedures." F. Ct. 25. (Emphasis added.)

7) The Tribe's Indian Child Welfare Coordinator will review the files of and "confer with

> those individuals associated with . . . Social Services who have been responsible for the children [to] assist in the presentation of . . . Social Services' concerns before the Tribal Court." F. Ct. 26.
>
> 8) *The foster parents* of two of the Indian children *are "willing to participate* in custody proceedings *in South Dakota."* F. Ct. 23. (Emphasis added.)
>
> 9) "The circumstances in this case do not warrant a denial of transfer based on the inconvenience or hardship to witnesses." F. Ct. 27.

App. 15-22. Recognizing the ICWA's strong preference for tribal jurisdiction, F. Ct. 42, App. 21, the family court again ordered transfer of the case to the tribal court.

The guardian[3], not social services, then appealed the decision of the family court to the state supreme court. At argument, the guardian eschewed the primary argument relied on below – that the transfer to tribal court would disrupt the long-standing foster placements[4] – and,

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[3] *See* note 2, *supra*, at p. 4 discussing the alliance between the foster parents and the guardian.

[4] The family court found that much of the lengthy delay was caused by the South Carolina courts. F. Ct. 31, App. 18. In fact, the foster parents and the guardian have caused the delay by persistently opposing the policies of the ICWA. Indeed, when the Tribe sought to expedite the review of this matter, the guardian opposed its motion. The result is that the Indian children in this case have been in non-Indian foster care for almost eight years. Yet, as this Court held in *Holyfield, supra*, at 1611, "the law cannot be applied to automatically

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instead, claimed that the transfer would cause "undue hardship to the parties and witnesses."

The state supreme court, without hearing any testimony, substituted new findings of fact without regard for the findings of the family court:

> [T]he majority of the witnesses necessary for the termination of parental rights action are located in South Carolina. . . . At the most recent family court hearing, ten witnesses testified as to the care, treatment and evaluation of the children, [including] experts, . . . the children's teachers, their *foster parents*, and neighbors of the *foster parents*. . . .
>
> *The foster parents . . . would like to adopt* [the Indian children] . . . . In attempting to show that "good cause" exists to overcome [the ICWA's Indian placement] preference, the *foster parents* will inevitably utilize testimony of *neighbors, friends, family*, teachers, social workers, and psychologists to show *their fitness as parents*, and to show how well the children have adjusted to their *foster home*. . . . Since the Tribe does not

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'reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing [and protracted] litigation.' "

Whether the tribal court would reunify the family after the rehabilitation of the parents, place the children with an Indian family or with the present foster parents with visitation rights for the extended family, is for the court to determine. *Id; see, also*, National Law Journal, Feb. 25, 1991, "After the Decisions, the Litigation Goes On," p. 1, 24 (tribal court granted adoption of the children to Ms. Holyfield after deciding it was in their best interest to remain with her).

> have to show good cause to overcome the preference, it seems likely that fewer witnesses from South Dakota will be involved. (Emphasis added.)

Based on its substitute findings, the state supreme court reversed the family court and denied the transfer.

REASONS FOR GRANTING WRIT OF CERTIORARI

I. THE SOUTH CAROLINA SUPREME COURT HAS JEOPARDIZED THE ABILITY OF INDIAN TRIBES TO PROTECT THEIR CHILDREN BY IGNORING THE CLEAR CONGRESSIONAL MANDATE OF THE INDIAN CHILD WELFARE ACT, 25 U.S.C. § 1901, *ET SEQ.*, AND THIS COURT'S TEACHING IN *MISSISSIPPI BAND OF CHOCTAWS V. HOLYFIELD*, ___ U.S. ___, 109 S. CT. 1597 (1989).

A. Introduction

In *Mississippi Band of Choctaws v. Holyfield*, ___ U.S. ___, 109 S. Ct. 1597, 1601 (1989), this Court declared that, "[t]he heart of the ICWA [is] its provisions concerning jurisdiction over Indian child custody proceedings." The Court made clear that federal law controls these jurisdictional issues. *Id.* at 1607 ("Congress intended to provide a uniform federal law . . . for the ICWA.") Nevertheless, the state supreme court completely ignored the federal law standards in denying transfer of jurisdiction to the tribal court.

As this Court explained in *Holyfield*, § 1911(b) "creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation." *Id.* at 1602. Congress directed that state courts *"shall transfer"*

such cases to tribal courts, unless there is "good cause" to deny the transfer. 25 U.S.C. § 1915(b) (emphasis added). The House Report clearly sets forth Congress' intention:

> The subsection is intended to permit a State court to apply a modified doctrine of forum non conveniens . . . *to insure that the rights* of the child as an Indian, the Indian parents or custodian, and the tribe *are fully protected*. (Emphasis added.)

H. R. Rep. No. 95-1386, p. 22 (1978), *reprinted* in 1978 U.S. Code Cong. & Admin. News, pp. 7530, 7544 (hereinafter "House Report"). After extensive hearings on the issue, the family court made exhaustive findings and transferred the case to tribal court. Incredibly, the state supreme court struck the carefully crafted findings of the family court and, on a cold record, substituted its own findings. In doing so, the court committed several grave errors:

1) The court denied the Indian parties due process of law when it violated the rule that "[t]he one who decides, must hear," *Morgan v. United States*, 298 U.S. 468, 481 (1936);

2) The court disregarded Congress' mandate establishing presumptive tribal court jurisdiction and created a *de facto* presumption in favor of state court jurisdiction;

3) The court failed to heed Congress' directive to fully protect the federal rights of the children as Indians, and the rights of the Indian mother and the Tribe; and

4) The court completely ignored this Court's decision in *Holyfield, supra*, that tribal jurisdiction under the ICWA must be determined by federal standards.

Although this Court in *Holyfield* carefully articulated its understanding of the Congressional intent embodied in the ICWA, the state supreme court refused to adhere to that federal policy, and found it unnecessary even to refer to *Holyfield* in its decision. Instead, the state supreme court zealously safeguarded the non-Indian foster parents and their friends, family and neighbors from inconvenience, while failing even to mention the hardship to the natural parents and the extended Indian family – the class of persons Congress intended to protect when it adopted the Act.

1) The State Supreme Court Denied the Indian Parties Due Process of Law By Making Substitute Findings of Fact Without Hearing the Live Testimony

"The right to the integrity of the family is among the most fundamental rights under the Fourteenth Amendment,"[5] House Report at 22, quoting *Davis v. Page*, 442 F. Supp. 258, 263 (S.D. Fl. 1977), and "a tribe's children are vital to its integrity and future." *Id.* at 14, approving *Wakefield v. Little Light*, 276 Md. 333, 347 A.2d 228 (1975). Title 25 U.S.C. § 1911(b) was enacted to fully "protect the rights of the child as an Indian, the Indian family and the Indian tribe," and to further Indian tribal sovereignty. *See Holyfield, supra*, at 1602; House Report at 21.

Due process requires a "hearing appropriate to the nature of the case." *United States v. Raddatz*, 447 U.S. 667,

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[5] The Committee noted its view that "the removal of a child from its parents is a penalty as great, if not greater, than a criminal penalty . . . . " House Report at 16.

677 (1979). Although the family court provided the parties with the full range of procedural protections in extensive hearings, *see*, App. 13, the state supreme court's appellate review negated the due process value of those hearings by summarily dismissing the family court's findings and substituting new "find[ings] of fact in accordance with its own view of the preponderance of the evidence." In short, the state supreme court violated the rule that "[t]he one who decides must hear." *Morgan, supra*, at 481; quoted in *Raddatz, supra*, at 677.

The family court's findings regarding the transfer issue necessarily involved determinations of the weight and credibility of witnesses' testimony. The Tribe's Indian Child Welfare Coordinator's testimony, for example, supported the family court's finding that:

> Participation in hearings in Chester County, far distant from the Reservation, is both difficult and expensive for the Tribe. . . . F. Ct. 24, App. 16.

The testimony of the foster parents indicated that at least two of them "were willing to participate in custody proceedings in South Dakota," F. Ct. 23, App. 16, and two of their friends had already traveled to South Dakota to prepare for their testimony at the transfer hearing.[6] The guardian made no showing at all as to hardship.

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[6] Two of the foster parents' friends and neighbors were sent by the guardian to the Cheyenne River Sioux Tribe's headquarters to see if reservation life would be appropriate for the children. After a three hour visit in which no contact was made with the Tribe, the neighbors determined that it was not.

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In stark contrast, the state supreme court, re-weighing the testimony without seeing or hearing the witnesses, found:

> [I]f this case were to be transferred to tribal court, it would cause undue hardship by forcing numerous witnesses from South Carolina to travel to South Dakota at considerable expense and difficulty. . . . [7]

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January, 1989 T ("Tr.") at 154, 153, W. Lambert ("it looked very nil"); Tr. at 161, P. Lambert ("very little up there"); *cf. Solem v. Bartlett*, 465 U.S. 463, 480 (1984) ("The seat of tribal government is . . . where most important tribal activities take place"). The friends also testified as to the condition of the children at the time they were removed from their natural parents. Tr. 158, P. Lambert ("their playground skills were very lacking"); *compare* Tr. 208, Gottlieb (the Tribe's expert testified that people "interpret [data] with [their] own *cultural bias* instead of being culturally sensitive to the people that we are evaluating"). (Emphasis added.)

The friends' testimony runs afoul of the Congressional policy which the Court carefully explained in *Holyfield*. The ICWA ensures that "Indian child welfare determinations are not based on 'a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family.' " *Holyfield, supra*, at 1602. The family court, which heard the testimony, gave it no weight. The state supreme court, on the other hand, found the supposed hardship to the friends to be a factor in denying transfer.

[7] The state supreme court accorded no weight to the Indian Child Welfare Coordinator's testimony regarding procedures to facilitate presentation of social services' records and recommendations to tribal court, despite the family court's finding that these procedures "would assist in the presentation" of social services' concerns. F. Ct. 26, App. 17.

The court also gave no weight at all to vital testimony presented to the family court concerning the federal rights of the children as Indians, the Indian mother and the Tribe. For example, the Tribe presented testimony that the rehabilitation of the parents was possible, indeed likely. *See* 25 U.S.C. § 1915(d). The Tribe's expert testified that his "reputation is working with people who do deny [sexual] abuse," and his "success rate with denying offenders is probably 90%." Tr. 210, 212, Gottlieb. In contrast, the social services worker testified that "the plan is for termination of parental rights because . . . Mr. and Mrs. Coleman have such a denial system set up regarding the abuse [that] there is no possibility that they would be able to be treated. . . . " 10/86 Tr. 60, Beatty. The presentation of that testimony plainly weighed heavily in the family court's decision to transfer the case to tribal court.[8]

Thus, this case presents the issue reserved in *Raddatz, supra*, at 681 n.7: May an appellate court, consistent with due process, substitute its determinations for those of a trial court as to the weight and credibility of live witnesses on dispositive issues? The Tribe respectfully submits that in these circumstances, such procedures violate due process. The interests of the Indian children, the Indian family and the Tribe are of the greatest import: the

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[8] Unlike the family court, the state supreme court viewed "the attempt to rehabilitate the parents" as something already passed. Thus, although the family court gave great weight to the testimony of the Tribe's expert on child abuse treatment, the supreme court accorded his testimony no weight whatsoever. *Compare* F. Ct. 34, 35; App. 19 with App. 6-8.

integrity of the family and the Tribe. Therefore, the children, their family and the Tribe have a "commanding" interest in the fairness and the accuracy of the court's decision.[9] *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981). The national interest in preventing the break-up of Indian families, 25 U.S.C. § 1902, and the minimal burden imposed in requiring appellate court deference to trial court findings of fact[10] support their interests. *Matthews v. Elderidge*, 424 U.S. 319, 335 (1976). The rule that "[t]he one who decides must hear" is an essential part of due process in these circumstances. *Morgan, supra; see Raddatz, supra*, at 679 ("More than 100 years ago, Lord Coleridge stated the view of the Privy Council that a retrial should not be conducted by reading notes of the witnesses' prior testimony").

2) The State Supreme Court Disregarded Congress' Mandate in Favor of Tribal Jurisdiction and Created a *De Facto* Preference For State Court Jurisdiction Solely for the Benefit of Non-Indian Foster Parents

Tribal relations and strong bonds to extended family members are essential parts of Indian life. Congress

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[9] The state supreme court's appellate review creates a serious risk of error. For example, the supreme court's findings erroneously suggest that treatment had been arranged for the children by social services. However, the record clearly reflects that no counseling or treatment has been provided to the children and accordingly, the family court specifically found that "[s]ocial services has not provided the children any counseling or therapy to date." F. Ct. 36; App. 19.

[10] A deferential standard of review on appeal would very likely reduce the burden on the appellate courts by reducing litigants' incentive to take "a fresh bite at the apple," and increasing the opportunity for summary review.

recognized the full significance of these tribal relationships: "An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close responsible members of the family," House Report at 10, and "[b]y sharing the responsibility of child rearing, the extended family tends to strengthen the community's commitment to the child." *Id.* at 11. By the same token, the Indian family is "the wellspring of [the] future" for Indian tribes. *Id.* at 19.

To protect tribal relations from disintegration at the hands of outside agencies[11], Congress established a comprehensive scheme of protections for the Indian child, the Indian family and their Tribe, including: exclusive/presumptive tribal court jurisdiction; mandatory provision of rehabilitative services to Indian parents; Indian foster care and adoptive placement preferences and a provision establishing tribal social and cultural norms as the standard for meeting those preference requirements. 25 U.S.C. § 1911, *et seq.*

Section 1911(b), which creates presumptive tribal court jurisdiction when Indian children are domiciled off-reservation, is at the heart of Congress' protective scheme. *Holyfield, supra,* at 1602. Transfer is mandatory, "absent good cause to the contrary." Congress intended

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[11] In *Holyfield, supra,* at 1606, the Court explained that: "Congress was concerned with the rights of Indian families and Indian communities vis-a-vis state authorities." Rep. Udall, the ICWA's sponsor, recognized that " 'state courts and agencies and their procedures share a large part of the responsibility' for the crisis threatening the future and integrity of Indian tribes and Indian families.' " *Id.* at n.18.

"to insure that the rights of the child as an Indian, the Indian parents or custodian, and the Tribe *are fully protected."* House Report at 21[12] (emphasis added).

The state supreme court refused to recognize the comprehensive nature of Congress' protective scheme, and failed to give any consideration to the protection of the federal rights created by the ICWA.[13] Even more troubling is the rationale actually employed by the court, which makes the Indian placement preference of 25 U.S.C. § 1915 an obstacle to presumptive tribal court jurisdiction in order to protect the placement of Indian children with non-Indian foster parents:

> *The foster parents* in South Carolina who currently have custody of the children *would like to adopt them.* However, the Indian Child Welfare Act provides that "a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915(a) (1978). In attempting to show that "good cause" exists to overcome this preference, the *foster parents* will inevitably utilize testimony of neighbors, friends, family, teachers, social workers and psychologists to show their fitness as parents, to show how well

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[12] Thus, Congress placed the burden on those opposing transfer to tribal court to prove by "clear and convincing evidence" that there is "good cause" to deny the transfer. *Matter of M.E.M.*, 635 P.2d 1313, 1317 (Mont. 1981). The state supreme court applied the wrong standard of proof; preponderance of the evidence. Thus, the decision in this case conflicts with the decision of the Montana Supreme Court. *Id.*

[13] *See* Discussion at Section 3, *infra*, p. 17.

> the children have adjusted to their *foster home*, and to show the impact on the children of removing them from their *foster home*. All of these witnesses would have to travel to South Dakota for the adoptive placement hearing. Since the Tribe does not have to show good cause to overcome the preference, it seems likely that fewer witnesses from South Dakota will be involved. (Emphasis added.)

To paraphrase the court's rationale, Indian child custody cases involving non-Indian foster parents should be heard in state courts because, as non-Indians, the foster parents will have to overcome the preference for Indian placement. Thus, the state supreme court established, *de facto*, a presumptive state court jurisdiction in Indian child custody cases solely for the benefit of non-Indian foster parents. In essence, this state supreme court decision transforms the Federal Indian Child Welfare Act into the "State Non-Indian Foster Placement Preservation Act."

Sections 1911(b) and 1915(a) are complimentary parts of the same Congressional plan to prevent the break-up of Indian families and to reduce the placement of Indian children by state agencies outside tribal society in non-Indian foster homes. *Id.* at 1602. The state supreme court's decision jeopardizes the ability of Indian tribes to protect their relations with their children by reversing the Congressional presumption in favor of tribal court jurisdiction.

3) The State Supreme Court Refused to Consider the Rights of the Indian Children as Indians, the Indian Parent and the Indian Tribe

"The Act is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected," *Holyfield, supra,* at 1609 n.24, quoting *In re Appeal of Pima County Juvenile Action,* 130 Ariz. 202, 204, 635 P.2d 187, 189 (App. 1981), and expresses a federal legislative judgment that "the interests of the tribe in custodial decisions made with respect to Indian children are as entitled to respect as the interests of the parent." *Holyfield, supra,* at 1610, quoting *In re Adoption of Holloway,* 732 P.2d 962, 969-70 (Utah 1986).

As noted above, the purpose of the "good cause" exception to the presumptive tribal court jurisdiction established by section 1911(b) is *"to insure that the rights* of the child as an Indian, the Indian parents . . . and the tribe *are fully protected."*[14] House Report at 21 (emphasis added). The statutory language and legislative history of the ICWA make clear that those rights include the interests in: 1) tribal custodial decision-making over Indian children, 25 U.S.C. § 1911; 2) rehabilitation of Indian

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[14] The House Report's section-by-section analysis explains: "The section seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society." House Report at 23. This language directly corresponds with the explanation of § 1911(b), and the sections must be read together to give effect to Congress' intent. *See, also,* House Report at 22 (§ 1912(d) creates a "Federal requirement . . . with respect to Indian children and families.")

parents and reunification of Indian families, 25 U.S.C. §§ 1912(d), 1914 and 1916; 3) placement of Indian children with Indian families, 25 U.S.C. § 1915; and 4) recognition of tribal social and cultural standards. 25 U.S.C. § 1915(d); *see, generally,* House Report at 21-24. Analysis of petitions to transfer Indian child custody cases to tribal courts must include careful consideration of whether the state or the tribal court is "better equipped" to protect these federal rights. *See* F. Ct. 41, App. 21.

a. Rehabilitation of the Parents

Section 1915(d) creates a "Federal requirement" that state agencies make "*active efforts* to provide assistance designed to prevent the breakup of Indian families." House Report at 22. In the present case, the natural parents have resided in South Dakota for the past five years. Travel to South Carolina is difficult for them due to their employment responsibilities. Social services, although recognizing the obligation to provide rehabilitative services, has not provided active rehabilitative services since initiating the action to terminate parental rights based on its belief that the natural parents cannot be rehabilitated because they deny that they abused the children. Tr. 32, Beatty; Tr. 187, Wandersman. In contrast, the Tribe identified an expert who specializes in treating abusive parents, and has a 90% success rate even in difficult cases where the parents deny the abuse. Tr. 212, Gottlieb. Reunification of the children with their natural parents is admittedly the ideal result in this case. Tr. 182-184, Wandersman. The Tribe clearly is in a better position to provide the rehabilitative services which are

necessary to reunify the family, and if the Tribe were successful, this case would proceed no further.

The family court considered the issue at length and found that there still exists "a possibility of rehabilitation and reuniting of the children and the parents." F. Ct. 34; App. 19. Yet, social services did not submit any proposal to provide rehabilitative efforts to the parents, and indeed, has already requested that the termination action be set for trial. Unfortunately, the state supreme court proceeded in like fashion, failing even to mention the possible rehabilitation of the parents or the reunification of this Indian family.

b. Protection of the Indian Children's Relations with their Tribe and the Tribe's Contacts with its Children

Section 1915(a) provides preference in the placement of Indian children for adoption with:

1) a member of the child's extended family;

2) other members of the Indian child's tribe; and

3) other Indian families.

Section 1915(b) provides similar preferences in the placement of Indian children in foster care.

The record demonstrates that if these Indian children are to be placed with extended Indian family members or another Indian foster or adoptive parent, that placement will necessarily be in South Dakota. The Indian Child Welfare Coordinator of the Tribe testified that he had been contacted by the grandfathers, aunts, uncles and

other Cheyenne River Sioux relatives of the children concerning the children's placement, Lends His Horse, Tr. 87, while social services admitted that there were no available Indian foster care placements in South Carolina. On that basis, the family court found:

> All of the blood kin of the children . . . are living in South Dakota. . . . The Indian heritage, to which these children are entitled, is on the Sioux Nation in the State of South Dakota. F. Ct. Sum.; App. 22.

Again, the children's right to maintain their tribal relations and the Tribe's right to keep its children within its society weighs heavily in favor of tribal jurisdiction, yet the state supreme court wholly ignored the witnesses' testimony and the family court's finding.

c. Tribal Social and Cultural Standards

Section 1915(d) requires that "the standards to be applied in meeting the [placement] preferences . . . shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides. . . . " The purpose of the subsection is to insure that Indian children's interest in placement with Indian families is not precluded by the application of "white, middle-class" standards. *Holyfield, supra,* at 1602.

Without doubt, the tribal court is better equipped to apply the prevailing social and cultural standards of the Cheyenne River Sioux Community than is the family court in South Carolina, and the family court, conducting the appropriate section 1911(b) analysis, emphatically agreed:

> Social services could not "locate anyone with expertise relative [to] the prevailing social and cultural standards of the Indian community in which the parent or extended family resides," and "[t]he Tribal Court is better equipped to deal with the delicate balancing of the [issues under the ICWA] than is [the family court]." F. Ct. 20, 41; App. 16, 21.

The state supreme court also failed to consider this issue. Indeed, the supreme court's opinion suggests that the local norms of the Rock Hill, South Carolina community are accorded more weight than tribal social and cultural standards.[15]

4) The State Supreme Court Completely Ignored the *Holyfield* Mandate that Presumptive Tribal Jurisdiction Must be Measured by Federal Law Standards

This Court's ruling in *Holyfield* is: Federal law defines the rights Congress created for Indian families and Indian tribes in the ICWA. *Holyfield*, *supra*, at 1607-10; *cf. Norwood v. Kirkpatrick*, 349 U.S. 29 (1955) (federal courts have "no occasion to look to state law" definitions in applying 28 U.S.C. § 1404(a)). In the present case, the state supreme court gravely erred in disregarding these federal rights, *see* Discussion at Sections 2 and 3, *supra*, based on its view that section 1911(b) modified the doctrine of forum non conveniens no further than to permit "state courts to

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[15] "[T]he foster parents will inevitably utilize testimony of neighbors, friends, family, teachers, social workers and psychologists to show their fitness as parents. . . . [I]t seems likely that fewer witnesses from South Dakota will be involved." App. 7.

determine whether the tribal court is a less convenient forum." App. 6. The supreme court then merely speculated that "fewer witnesses from South Dakota" would be called. The state supreme court's analysis utterly fails to meet the federal standards of even an *unmodified* forum non conveniens test.

Congress established a statutory federal doctrine of forum non conveniens in 28 U.S.C. § 1404(a):

> For the convenience of the parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division. . . .

Therefore, in determining transfer motions made pursuant to § 1404(a), federal courts consider: 1) the convenience of the parties; 2) the convenience of the witnesses; and 3) the interests of justice. *See* Revisers Note to 28 U.S.C. § 1404(a); *cf. Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947); *see*, C. Wright, A. Miller and E. Cooper, 15 *Federal Practice and Procedure* § 3841, *et seq.* The balance of convenience must "greatly favor" the moving party to overcome the presumption in favor of the plaintiff's choice of forum. *See, e.g., Anonymous v. F.D.I.C.*, 617 F. Supp. 509, 512 (D.D.C. 1985). In the context of the ICWA, Congress has established a statutory presumption in favor of the tribal court as the forum for determining Indian child custody cases and the burden of proof is on the party opposing presumptive tribal court jurisdiction. 25 U.S.C. § 1911(b); *see* note 12, *supra*, at p. 15.

a. Convenience of the Parties

In this case, the convenience of the parties is clearly served by transfer of the case to tribal court. First,

Congress has recognized that the Tribe's interests are "as entitled to respect as are the interests of the parents," *Holyfield, supra,* at 1610, and the Tribe presented evidence that it is both difficult and expensive for the Tribe and the Indian Child Welfare Coordinator to run the gauntlet of state court proceedings in South Carolina. Second, the natural parents live in South Dakota, and they have difficulty travelling to South Carolina due to their employment responsibilities. The natural parents clearly are essential to the next stage of proceedings in this case, whether that involves rehabilitation and reunification of the Indian family or termination of parental rights and adoptive placement.[16]

In contrast, the only South Carolina party to the proceedings is social services and the record demonstrates that the Tribe has "ample procedures" to facilitate the presentation of social services' views to the tribal court. F. Ct. 27, App. 17. The record also indicates that if the case is transferred to tribal court, the Cheyenne River Agency Bureau of Indian Affairs social service personnel will fill the role played by social services in the state proceedings.

b. Convenience of the Witnesses

As to the materiality of the testimony of social services' personnel, it is clear that Bea Beatty has had the

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[16] It should be noted that termination of parental rights actions under the ICWA require proof "beyond a reasonable doubt," 25 U.S.C. § 1912(f), and in the criminal proceeding against the parents where the same standard of proof was employed, 11 of 12 jurors voted for acquittal.

primary responsibility for this case since the outset and her convenience should have been balanced against the convenience of the Tribe's Indian Child Welfare Coordinator in determining the transfer issue. Similarly, although the state supreme court found that the "majority of witnesses" necessary for the termination of parental rights action are located in South Carolina, App. 6, the family court's decision of February 28, 1986, demonstrates that the only essential South Carolina witness is Dr. Schuh, the medical expert who conducted the physical and psychological examination of the children. App. 41-42. As an expert witness, her locale is entitled to little or no weight. *E.g., In re Ralston Purina Co.*, 726 F.2d 1002, 1006 (4th Cir. 1986).

More importantly, the state supreme court never considered that the children's natural parents will "inevitably" call witnesses to testify to their fitness as parents at any hearing to terminate parental rights.[17] Since the natural parents have been living with their other children in South Dakota for the past several years, these witnesses would necessarily be from South Dakota. *Cf.* App. 22 ("All of the blood kin . . . live in South Dakota."); *In re Appeal of Pima County, supra,* at 192 ("the issue in these termination proceedings is not the fitness of the adoptive

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[17] In contrast, the supreme court placed great weight on its view that "the foster parents will inevitably utilize the testimony of neighbors, friends, family . . . to show their fitness as parents." App. 7. Indeed, the court based its denial of transfer to tribal court, in large part, upon findings regarding the need to provide for the convenience of the non-Indian foster parents and their neighbors, friends and family. *See* App. 7.

parents, but rather the unfitness of the parent whose relationship is sought to be terminated.").

Finally, the state supreme court failed to accord any weight to the extended Indian family. The record is clear that the maternal grandparents, aunts and uncles, and the children's other Cheyenne River Sioux relatives are interested in the custody of these children. Thus, there is no basis for the court's speculation that "fewer witnesses from South Dakota will be involved" if adoptive placement should become necessary.

c. The Interests of Justice

Under § 1404(a), the interests of justice are often a controlling factor. *See*, C. Wright, A. Miller, E. Cooper, *supra*, at § 3854. In the present case, Congress has emphatically declared the *national interest* in preventing the breakup of Indian tribal and familial relations, and the natural parents have fundamental interests, under the Fourteenth Amendment, in maintaining their parental rights. As demonstrated above, the tribal court is ready and willing to make efforts to rehabilitate the parents and reunite the family. Alternatively, if those efforts were not successful, the tribal court is in a far better position to take the necessary steps to retain the children within its society than is the state court. Clearly, the interests of justice favor the forum that can best protect these Indian tribal and familial relations – that forum is the tribal court.[18]

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[18] The federal courts have also considered promptness in the disposition of the case and familiarity with local law in

(Continued on following page)

In sum, the convenience of the parties clearly favors the tribal court because the natural parents and the Tribe are located on the Cheyenne River Indian Reservation, the convenience of the witnesses favors the tribal court and the interests of justice favor the tribal court. The state supreme court wholly failed to consider the federal forum non conveniens standards in determining the transfer issue. Instead, the court relied on an impermissible "battle of numbers," *cf. American Standard, Inc. v. Bendix Corp.*, 487 F. Supp. 254, 263 (D.C. Mo. 1980), to supersede the clear mandate of this Court's decision in *Holyfield* and make the interests of the non-Indian foster parents paramount over the interests of the natural parents and the Tribe.

CONCLUSION

The refusal of the South Carolina Supreme Court to recognize and adhere to the "policy of this Nation to protect the best interests of Indian children and to

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(Continued from previous page)

determining the interests of justice. *Parsons v. Chesapeake & O.R. Co.*, 375 U.S. 71 (1963); *Gulf Oil Corp. v. Gilbert, supra*, at 508. These factors also favor tribal court resolution of this case. The Tribe's Indian Child Welfare Coordinator testified in October, 1986 that "[i]f this had happened on the Cheyenne River Reservation, it would have been taken care of right away. If it had been proved that these children were sexually abused, it would have gone to Federal Court right away." 10/86 T. 55. Similarly, the tribal court's greater familiarity with the prevailing tribal social and cultural standards cannot be gainsaid.

promote the stability and security of Indian tribes and families" through the aegis of the Indian Child Welfare Act is particularly eggregious. The state supreme court employed an appellate procedure which violated the due process rights of the Indian parties, reversed the presumptive tribal jurisdiction mandated by Congress in favor of a judicial presumption of state court jurisdiction – solely for the benefit of non-Indian foster parents – and rejected the teachings of this Court's decision in *Mississippi Band of Choctaws v. Holyfield*, ___ U.S. ___, 109 S.Ct. 1597 (1989) without even a reference. In sum, the state supreme court transformed the Federal Indian Child Welfare Act into a "State Non-Indian Foster Placement Preservation Act." Thus, whether through plenary review or summary dismissal, the state supreme court's decision warrants reversal.

Dated: March 11, 1991

Respectfully submitted,

Scott B. McElroy
Mark C. Van Norman
Greene, Meyer & McElroy, P.C.
1007 Pearl Street, Suite 240
Boulder, Colorado 80302
(303) 442-2021

Steven C. Emery
Tribal Attorney
Cheyenne River Sioux Tribe
P.O. Box 590
Eagle Butte, South Dakota 57625
(605) 964-4155

Counsel for Petitioner, Indian Child Welfare Coordinator of the Juvenile Court of the Cheyenne River Sioux Tribe

No. _____

In The

Supreme Court of the United States

October Term, 1990

INDIAN CHILD WELFARE COORDINATOR
OF THE JUVENILES COURT OF THE
CHEYENNE RIVER SIOUX TRIBE, ET AL.

Petitioners,

v.

CHESTER COUNTY DEPARTMENT
OF SOCIAL SERVICES, ET AL.

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court Of South Carolina

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Chester County Department of Social Services,

Respondent,

v.

Joe L. Coleman, Phyllis Coleman and Dorothy Clark, Indian Child Welfare Coordinator of the Cheyenne River Sioux Juvenile Court,

Respondents.

In Re:

Billie Joe Morrison, DOB: 1-1-78, Tara Morrison, DOB: 5-9-79, Jaqueline Coleman, DOB: 10-26-81, Heather Coleman, DOB: 1-31-83, all minor children under the age of Eighteen (18) years.

Of whom Billie Joe Morrison, Tara Morrison, Jacqueline Coleman and Heather Coleman, by any through their dully appointed Guardian Ad Litem Richard M. Steele, are

Appellants.

Appeal From Chester County
Thomas B. Barrineau, Family Court Judge

Opinion No. 23297
Heard September 25, 1990 –
Filed December 10, 1990

REVERSED

Robert Marshall Jones, of Rock Hill, for Appellants.

Claude S. Coleman, of Chester County Dept. of Social Services, of Chester, for Respondent.

Scott B. McElroy, of Boulder, CO., and George M. Hearn, of Conway, both for Respondents Dorothy Clark, and Cheyenne River Sioux Tribe.

Joe and Phyllis Coleman, of Howes, South Dakota, *pro se.*

PER CURIAM: This case involves the application of the Indian Child Welfare Act.[1] The sole issue is whether the family court erred in transferring jurisdiction of the case to the Cheyenne River Sioux Tribe (Tribe), in South Dakota. We reverse the order of the family court.

I. FACTS

This case involves the application of the Indian Child Welfare Act to proceedings in Chester County regarding the removal of four Indian children from their parents. The proceedings in this case are complicated and have been protracted. However, a brief summary of pertinent portions of the proceedings is necessary. The children were removed from their parents in November, 1983, due to physical abuse. Since that time, they have remained in temporary foster care in South Carolina, pending the outcome of this case. In September, 1985, the Department of Social Services also alleged sexual abuse. Efforts to rehabilitate the parents were unsuccessful, but parental rights were not terminated because the parents, Joe and

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[1] 25 U.S.C. § 1901 *et seq.* (1978).

Phyllis Coleman,[2] moved to transfer jurisdiction to the Cheyenne River Sioux Tribal Court pursuant to the Indian Child Welfare Act. The Indian Child Welfare Act mandates that certain state court proceedings be transferred to the jurisdiction of the child's tribe, absent good cause. 25 U.S.C. § 1911(b) (1978). After a hearing, the family court issued an order on November 10, 1986, requiring the transfer of custody and jurisdiction of the children to the Tribe.

This order was then stayed by the family court pending a final decision on appeal. On September 26, 1988, the Court of Appeals rendered an opinion remanding the case to family court to consider factors which might constitute "good cause" for the family court to retain jurisdiction. *Chester County Dept. of Social Services v. Coleman*, 296 S.C. 355, 372 S.E.2d 912 (1988). The family court held a hearing and on April 5, 1989, issued an order finding that "good cause" did not exist to retain jurisdiction, and ordering custody of the children transferred to the Tribe. The family court denied a motion for supersedeas made by the guardian ad litem on behalf of the children. On July 21, 1989, we granted the guardian ad litem's motion for supersedeas.

II. DISCUSSION

The sole issue presented is whether jurisdiction should be transferred to the tribal court pursuant to the Indian Child Welfare Act which provides that:

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[2] Phyllis Coleman is the mother of all four children. Joe Coleman is the father of only the two youngest children.

> In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe.

25 U.S.C. § 1911(b) (1978).

This Act was enacted because large numbers of Indian children were being separated from their families and tribes caused by adoption and foster care placement in non-Indian homes be state welfare entities. 25 U.S.C. § 1901(4) (1978). To remedy this problem, the Act provides Indian tribes with a central role in custody proceedings involving Indian children. Thus, proceedings involving Indian children must be transferred to the jurisdiction of the Indian child's tribe, "in the absence of good cause to the contrary". 25 U.S.C. § 1911(b) (1978).

"Good cause" is not defined in the Act itself. However, the legislative history states that the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a child custody proceeding involving an Indian child. S. Rep. No. 597, 95th Cong., 1st Sess. 17 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 7530. The Bureau of Indian Affairs (BIA) published non-binding guidelines to aid state courts in interpreting the Act. (BIA Guidelines) *See* Guidelines for State Court; Indian Child Custody Proceedings, 44 Fed. Reg. 67584 (1979). The BIA Guidelines list several factors which may constitute "good cause" to deny transfer of jurisdiction to a tribal court. 44 Fed. Reg. at 67591. Appellant argues that "good cause" exists to deny transfer of jurisdiction under the BIA Guidelines,

because the case "could not be adequately presented to the tribal court without undue hardship to the parties and the witnesses." 44 Fed. Reg. at 67591, Guideline (b)(iii) (1979). The commentary to this BIA Guidelines points out that:

> Consideration of whether or not the case can be properly tried in tribal court without hardship to the parties or witnesses was included on the strength of the section-by-section analysis in the House Report on the Act, which stated with respect to the § 1911(b), "[t]he subsection is intended to permit a State court to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected."

44 Fed. Reg. at 67591.

The doctrine of *forum non conveniens* is modified in the Indian child custody context so as to allow state courts to determine whether the tribal court is a less convenient forum. The BIA Guidelines acknowledge that "application of this criterion will tend to limit transfers to cases involving Indian children who do not live very far from the reservation." 44 Fed. Reg. at 67591.

The family court determined that a denial of transfer of jurisdiction was not warranted based on the inconvenience or hardship to witnesses, because it would be "far more difficult for the Tribe to participate in these proceedings" in South Carolina than for the South Carolina witnesses to testify in South Dakota. We disagree.

Several courts have held that "good cause to deny transfer of jurisdiction to the tribal court may arise from geographical obstacles." *In Interest of J.R.H.*, 358 N.W.2d

311, 317 (Iowa 1984). In the case of *Matter of Wayne R. N.*, 107 N.M. 341, 757 P.2d 1333 (N.M. App. 1988), the New Mexico court denied a transfer to the tribal court, noting that if the "case were to be transferred to the tribal court, the witnesses would all be forced to travel to Oklahoma, at considerable expense and difficulty." *Id.* 757 P.2d at 1336. In the case of *Matter of N. L.*, 754 P.2d 863 (Okl. 1988), the Oklahoma court denied a request for transfer to a tribal court, finding that "good cause to deny a transfer has been found where almost all the parties and witnesses reside in the county of the state court and have no contact with the tribal court." 754 P.2d at 869. *See also In re Robert T.*, 200 Cal. App.3d 657, 246 Cal. Rptr. 168 (1988) (holding that proximity of the court to the numerous records and witnesses in the proceedings are pertinent and adequate reasons to deny transfer); *People in Interest of J. J.*, 454 N.W.2d 317 (S.D. 1990) (upholding trial court's determination that evidence could not be adequately presented to tribal court without undue hardship to parties and witnesses).

Here, the bulk of the evidence and the majority of the witnesses necessary for the termination of parental rights action are located in South Carolina. South Carolina, through the Department of Social Services, has had extensive contact with the family unit. The Department of Social Services was involved in the physical and sexual abuse hearings, in the attempt to rehabilitate the parents, and in evaluating and treating the children. Throughout the various hearings involving these children, there has been extensive testimony from experts, including doctors, psychologists, social workers, and child abuse specialists. At the most recent family court hearing, ten witnesses

testified as to the care, treatment and evaluation of the children over the prior six years. These witnesses included experts as well as the children's teachers, their foster parents, and neighbors of the foster parents. All of the witnesses to the physical and sexual abuse, as well as records of treatment and evaluation are located in South Carolina, while the tribal court is located several thousand miles away in South Dakota.

If parental rights are terminated, there will be an adoptive placement hearing. The proceedings for adoptive placement will involve testimony from witnesses from both South Carolina and South Dakota. The foster parents in South Carolina who currently have custody of the children would like to adopt them. However, the Indian Child Welfare Act provides that "a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915(a) (1978). In attempting to show that "good cause" exists to overcome this preference, the foster parents will inevitably utilize testimony of neighbors, friends, family, teachers, social workers, and psychologists to show their fitness as parents, to show how well the children have adjusted to their foster home, and to show the impact on the children of removing them from their foster home. All of these witnesses would have to travel to South Dakota for the adoptive placement hearing. Since the Tribe does not have to show good cause to overcome the preference, it seems likely that fewer witnesses from South Dakota will be involved.

In appeals from the family court, this Court has authority to correct errors of law and find facts in accordance with its own view of the preponderance of the evidence. *Miller v. Miller*, 299 S.C. 307, 384 S.E.2d 715 (1989). We find that the facts demonstrate that if this case were to be transferred to the tribal court, it would cause undue hardship by forcing numerous witnesses from South Carolina to travel to South Dakota at considerable expense and difficulty. We realize that by retaining jurisdiction, we are imposing some hardship on the parties and witnesses from South Dakota. However, this case has been in our court system seven years, during which time numerous hearings have been held, and volumes of records have been compilated. In addition, there are at least a dozen witnesses in this State who have had extensive contact with the children and with this case. These witnesses have been in close contact with the children and will be able to provide invaluable testimony in the future proceedings. Thus, we conclude that it is imminently more practical to allow the case to proceed in South Carolina. Based on the foregoing, we find that good cause was shown to deny the transfer. Accordingly the order of the family court is

REVERSED.

/s/ David W. Harwell A.C.J.
/s/ A. Lee Chandler A.J.
/s/ Ernest A Finney Jr. A.J.
/s/ Jean H. Toal A.J.
/s/ James E. Moore A.A.J.

STATE OF SOUTH CAROLINA COUNTY OF CHESTER	)	IN THE FAMILY COURT No. 83-DR-12-400
Chester County Department of Social Services, Petitioner, vs. Joe L. Coleman, Phyllis Coleman and Joe Lends His Horse, Indian Child Welfare Coordinator of the Cheyenne River Sioux Juvenile Court, Respondents. In Re: Billie Jo Morrison, DOB: 1-1-78 Tara Morrison, DOB: 5-9-79, Jacqueline Coleman, DOB: 10-26-81 Heather Coleman, DOB: 1-31-83, all minor children under the age of eighteen (18) years.	)	PROPOSED FINDINGS OF FACTS AND ORDER SUBMITTED BY THE CHEYENNE RIVER SIOUX TRIBE and JOE LENDS HIS HORSE, INDIAN CHILD WELFARE ACT COORDINATOR

I. HISTORY OF THE CASE

1. This case involves the custody of four children. The oldest is Billie Jo Morrison, eleven years of age. Tara Morrison is nine years old. Jacqueline Coleman is seven years old, and Heather Coleman is six years old. Joe Coleman is the natural father of Jacqueline and Heather. Phyllis Coleman is the mother of all four children who are enrolled members of the Cheyenne River Sioux Tribe.

2. On November 11, 1983, the State of South Carolina filed its first motion for removal of the four minor Indian children from the Coleman's home. On November 15, 1983, a 10-day hearing was held and thereafter the

Indian children remained in the custody of the Department of Social Services.

3. On December 12, 1983, Ms. Cindy Hord was appointed guardian ad litem for the Indian children, with Mr. Lamar H. Kelsey, III, appointed as her attorney. On December 22, 1983, a merit hearing occurred before Judge Mobley, to whom the case was then assigned, who continued custody with Social Services.

4. In May, 1984, South Carolina Social Services filed a petition seeking the return of the Indian Children to their parents. The agency alleged that the parents had cooperated with them and had fulfilled the prescribed treatment objectives, which would have allowed the children to be returned to their parents' care. Shortly thereafter, new allegations of parental sexual abuse of the children surfaced.

5. In July, 1984, the Cheyenne River Sioux Juvenile Court ("the Tribal Court") petitioned to intervene in this case, requested transfer of jurisdiction to the Tribal Court, and issued an Order purporting to place the Indian children in the care and custody of their grandparents, who live on the Cheyenne River Sioux Reservation. Shortly thereafter, on July 10, 1984, Judge Mobley considered whether to transfer jurisdiction to the Cheyenne River Sioux Tribe. He declined to transfer the case at the conclusion of that hearing.

6. In the meantime, the Indian children remained with their foster parents while the allegations of parental sexual abuse were investigated. In April, 1985, the Colemans were tried in South Carolina State Court for criminal sexual conduct with respect to the two oldest Indian

children. A mistrial resulted due to a hung jury. Thereafter, the State dropped the criminal proceedings.

7. A hearing before the Family Court was held in February, 1986, on the merits of the abuse allegations by the State against the Indian children's mother and her husband, and the issue of transfer of jurisdiction was again raised. The court responded by issuing an Order which required transfer of the children and the files to " . . . an appropriate corresponding agency in a state near the tribal lands of the minor children for placement according to the policies established by the Indian Child Welfare Act of 1978, as amended." Order, para. 3, February 28, 1986. The State's Social Services' Department contacted the State of South Dakota, which declined to accept the case because it advised that it lacked jurisdiction over reservation Indian children.

8. Thereafter, the State of South Carolina requested a hearing on the placement of the children. This hearing occurred on October 1, 1986.

9. On November 10, 1986, the Family Court issued its Order requiring the transfer of custody and jurisdiction to the Cheyenne River Sioux Tribe by December 3, 1986. Prior to transfer, counsel for the foster parents (Mr. Jones) moved for a stay of the transfer order pursuant to Supreme Court Rule 41. Attorney for the guardian ad litem and the children (Mr. Kelsey) presented a written motion for stay and the attorney for the Chester County Department of Social Services orally joined the request for a stay of the transfer, pending the outcome of the appeal. The stay was granted, pending appeal.

10. On March 31, 1987, guardian ad litem Cindy Hord and attorney for the guardian and children, Mr. Kelsey, moved to withdraw and requested that substitute counsel, Mr. Jones (formerly the foster parents' attorney) be permitted to enter his appearance, along with substitute guardian ad litem, Richard M. Steele.

11. On May 21, 1987, guardian ad litem Cindy Hord and Mr. Kelsey were relieved of their duties, pursuant to Court Order; Mr. Steele was designated new guardian ad litem and Mr. Jones was allowed to serve as his attorney.

12. Following briefing and oral argument, the Court of Appeals issued a decision reversing and remanding for "a redetermination of the issue" because it could not "make [a] factual determination on the record before [it]" on the question of whether good cause to the contrary existed which would justify refusing to transfer the matter to the Tribal Court. The Court directed:

> In this case, the family court failed to consider the various factors which may constitute "good cause" under the statute. This was error. What little we are able to glean from the record indicates that a biological parent of the two older girls, both of whom are over five years of age, may be unavailable; that none of the children has had any contact with the tribe or has resided on the reservation for a significant period of time; and that the material witnesses and evidence relating to placement are in South Carolina, not South Dakota. These factors, together with evidence that removal of the children would be disruptive and detrimental to their best interests, may well constitute "good cause" for the family court to retain jurisdiction of the case.

> Because we are unable to make this factual determination on the record before us, we reverse and remand for a redetermination of the issue. In deciding if "good cause to the contrary" exists or not, the family court should make specific findings on the factors outlined above.

Chester County Department of Social Services v. Coleman, Opinion at 13 (Court of Appeals, Sept. 26, 1988).

13. A hearing in response to that order was held in this Court on January 19 and 20, 1989. At that hearing, evidence and argument was presented by the Tribe, the guardian ad litem and the Department of Social Services.

14. Prior to the hearing, the Tribe filed a Motion in Limine contending that consideration of evidence of the impact of the removal on the children was not appropriate under the terms of the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.* ("the ICWA") contending principally that such matters were relevant in a custody or placement hearing but were not relevant to determining which court had jurisdiction. At the hearing, the Tribe agreed to the presentation of evidence on this issue in order to ensure that an adequate record was developed for the Court of Appeals, provided that its agreement would not be viewed as a concession on its part as to the relevance of such matters. All parties agreed to this arrangement and in fact, the Tribe presented evidence on the possible impact on the children of various custody arrangements.

II. THE BUREAU OF INDIAN AFFAIRS GUIDELINES

15. The Bureau of Indian Affairs Guidelines provide:

C.3. Determination of Good Cause to the Contrary

(a) Good cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the Act to which the case can be transferred.

(b) Good cause not to transfer the proceeding may exist if any of the following circumstances exists:

(i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.

(ii) The Indian child is over twelve years of age and objects to the transfer.

(iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.

(iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

(c) Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.

(d) The burden of establishing good cause to the contrary shall be on the party opposing the transfer.

44 Fed. Reg. 67591 (1979).

16. In the present instance, it is plain that the Cheyenne River Sioux Tribe has a court and therefore section

C.3. (a) does not support a refusal to deny transfer to the Tribal Court.

17. Here the Tribe intervened in July, 1984, shortly after it became apparent that the Department of Social Services would not be able to reunite the children with the parents as originally contemplated and that the separation of the children from their parents might continue for some time. Ms. Bea Beaty testified that the Department of Social Services had originally contemplated returning the children to the Colemans in May or June of 1984 and the Tribe intervened in July, 1984. Mr. Lends His Horse testified that the Tribe is concerned under the ICWA about the separation of a child from its family for a substantial period of time. He further testified that the Tribe has limited resources for its program and that it seeks to determine the nature of the separation before intervening. Under these circumstances, the Tribe intervened and asked for a transfer to the Tribal Court in a timely fashion and Section C.3.(b)(i) provides no basis to deny transfer to the Tribal Court.

18. None of the children are over 12 years of age and thus section C.3.b(ii) is inapplicable.

19. Section C.3.(b)(iii) of the Guidelines permits the court

> "to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected." Where a child is in fact living in a dangerous situation, he or she should not be forced to remain there simply because the witnesses cannot afford to travel long distances to court.

Section C.3. Commentary, 44 Fed. Reg. 67591.

20. Section 1915 of the ICWA mandates placement of these children with Indian families in the absence of good cause to the contrary. Section 1915 (d) requires a court to apply these requirements based on "the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and culture ties." Ms. Beaty testified that she had been unable to locate any one with any expertise relative to those standards in or around Chester County.

21. Ms. Beaty further testified that Phyllis and Joe Coleman now reside on the Cheyenne River Sioux Reservation in South Dakota.

22. Ms. Lillian Whitehead, a sister of Stella Redwine, the foster mother of the two Morrison children, testified that she would "try" to go to South Dakota to testify in any proceeding concerning custody of the children.

23. Mr. Robert Redwine, the foster father of the two Morrison children said that the Redwines were willing to participate in custody proceedings in South Dakota.

24. Participation in hearings in Chester County, far distant from the Reservation, is both difficult and expensive for the Tribe.

25. Counsel for the Tribe represented that the Tribe would cooperate in facilitating the participation of local witnesses in the conduct of hearings before the Tribal Court through the use of trial depositions and other procedures.

26. Mr. Lends His Horse testified that in considering the placement of the children he would want to review the complete files of the Chester County Department of Social Services and to confer with those individuals associated with the Department of Social Services who have been responsible for the children. This procedure would assist in the presentation of the Department of Social Services' concerns before the Tribal Court.

27. There is no evidence suggesting that interest sought to be protected by Section C.3.(b)(iii) would be injured by transfer to the Tribal Court. While undoubtedly difficult for the South Carolina witnesses to physically testify in South Dakota, ample procedures exist to mitigate those hardships. On the other hand, it is far more difficult for the Tribe to participate in these proceedings yet the ICWA mandates tribal participation. I find that the circumstances in this case do not warrant a denial of transfer based on the inconvenience or hardship to witnesses.

28. Finally, Section C.3.(b)(iv) is not applicable since the mother of the four children, who is a member of the Tribe, is available and the children were raised by her prior to the institution of these proceedings.

29. Considerable testimony was elicited concerning the present placement of the children in the two foster homes and the impact on the children if the present placements were disrupted.

30. It is undisputed that the present placements provide the children with a safe and secure environment.

31. Although the placement of these children with their respective foster parents has always been intended to be temporary, the children have become attached to their foster parents. In significant part, this attachment results from the delay in resolving these matters by the courts.

32. While there is no dispute that removing the children from their foster parents will be disruptive, considerable controversy exists over the severity of the impact and whether that impact warrants a refusal to transfer jurisdiction to the Tribal Court. There was also testimony about the steps which might be taken to alleviate the impact on the children if removal were to occur.

33. In addition to the testimony about the impact of removal, considerable evidence was presented about the potential long-term impact of denying the children the ability to participate in the culture of the Cheyenne River Sioux Tribe. Dr. Wandersman, a clinical psychiatrist who evaluated the child for the Department of Social Services and expressed concern about the effect of removal, testified that she agreed with the statement adopted in 1975 by the American Academy of Child Psychiatry:

> There is much clinical evidence to suggest that these Native American children placed in off-reservation non-Indian homes are at risk in their later development. Often enough they are cared for by devoted and well-intentioned foster or adoptive parents. Nonetheless, particularly in adolescence, they are subject to ethnic confusion and a pervasive sense of abandonment with its attendant multiple ramifications. Consequently, these problems combines [sic] with their

untoward early childhood preplacement experiences adversely affect their young adulthood and their own potential capacities as parents.

34. This issue is further complicated by the fact that the parental rights have not been terminated and the children could be reunited with their birth mother and father or step father as the case may be.

35. Mr. Bruce Gottlieb, a clinical social worker who testified for the Tribe, stated that he was of the opinion that separating Indian children from their culture had the potential to create serious problems for the children in the long term. Mr. Gottlieb further stated that it was important for these children to develop their identity as an Indian in order for them to develop their identity as an individual. He also stated that there is no substitute for participating in Indian culture and that second hand activities are not a sufficient substitute for being a part of the tribal culture. He noted that each tribe had a different history and background and that while it was beneficial for the children to observe different tribes, it was important for these children in the long term to be involved with the Cheyenne River Sioux Tribe.

36. Mr. Lends His Horse testified that the Tribe had resources available through the Bureau of Indian Affairs and the South Dakota Department of Social Services to provide the children with suitable counseling and therapy to assist in the impact of removal as well as the abuse which they have suffered. The Department of Social Services has not provided the children with any counseling or therapy to date.

37. The Tribal Court is well equipped to deal with the difficult questions which surround the placement of

these children. Mr. Lends His Horse works with the South Dakota Department of Social Services and the Bureau of Indian Affairs in carrying out his duties as the Indian Child Welfare Act Coordinator for the Tribe. Any recommendation Mr. Lends His Horse makes to the Tribal Court relative to these children will be premised upon the advice which he receives from the above-mentioned Departments as well as the existing records and files of the Chester County Department of Social Services.

38. The considerable evidence presented by the Tribe on the importance of raising Indian children in their tribal culture and maintaining their relationship with their tribe is persuasive and not directly rebutted by any of the testimony of witnesses for the guardian ad litem or Department of Social Services. Although there was testimony that the foster parents were aware of the need for the children to maintain contact with their tribal heritage, the testimony that reading and other second hand information is much different than actually being a part of Indian culture which varies from tribe to tribe and which must be learned first hand makes that assertion of little significance.

39. I find that it would be harmful for these children to be separated from their Tribe and that the efforts of the foster parents to teach the children about their heritage is not an adequate substitute for being part of that culture.

40. I also find that the removal of these children from their foster homes will be disruptive and adversely affect the children in the short term. There is no basis to conclude however that removal and placement with the

tribal community will be detrimental to the children in the long term.

41. I find therefore that the impact of removal does not constitute good cause for this Court to refuse to transfer jurisdiction to the Tribal Court. Nor does it contribute to, or otherwise bolster the other factors which may be considered under the Bureau of Indian Affairs Guidelines to justify refusal to transfer jurisdiction to the Tribal Court. To the contrary, these circumstances strongly justify transfer to the Tribal Court which is better equipped to deal with the delicate balancing of these different factors than is this Court.

42. This Court considers the Act's mandate requiring the transfer of jurisdiction to the tribe strong. Likewise, I concur in the general premise and assumption that protection of an Indian child's relation to the tribe is in the child's best long term interest. Thus, I must conclude these particular facts, as above set forth, do not consitute [sic] "good cause to the contrary" as contemplated by Act.

43. I further conclude that due to the extraordinary circumstances of this case, the Guardian ad Litem is entitled to compensation in excess of the sum specified by Rule 51 of the Rules of Practice for Family Courts. While by no means considering this sum adequate, I determine Five Hundred and no/100 ($500.00) Dollars is a minimal amount due the Guardian ad Litem as payment for his services.

IN SUMMARY:

The basic and only issue to be decided in this case is whether or not the jurisdiction to hold further hearings concerning placement, termination of parental rights, and possibly adoption hearings should lie in South Carolina or in South Dakota. It should be remembered that these are Indian children whose welfare should be governed by Indian law. South Carolina, in my opinion, has no business in the case at this point other than the responsibility of housing the children. Decisions about their future should be made in South Dakota. The parental rights of these people, who are now residents of South Dakota, have not even been terminated at this point. All of the blood kin of the children, with the exception of the paternal grandparents in North Carolina, are living in South Dakota. The Indian heritage, to which these children are entitled, is on the Sioux Indian Nation in the State of South Dakota. At this point in time, nothing remains in South Carolina except the children themselves. The fact that the foster parents have given so much to the children and have provided so well for them gives me much concern regarding my ruling and my heart goes out to these fine people who have become so emotionally and lovingly attached. It should be remembered, however, that there still exists a possibility of rehabilitation and reuniting of the children and the parents or at least reuniting all of the children with an Indian family as opposed to the present situation wherein two of the children are placed with Black foster parents and two of the children are placed with White foster parents. The jurisdiction issue in this case should be decided in favor of the Indian Court in South Dakota and not the Family Court

of South Carolina in determining what is best in the future placement and/or adoption of these *original Americans* as mandated by Federal Law.

IT IS ORDERED:

(1). That legal custody of the four minor children, to-wit: (a) Billie Jo Morrison, born January 1, 1978; (b) Tara Morrison, born May 9, 1979; (c) Jacqueline Coleman, born October 26, 1981; and (d) Heather Coleman, born January 31, 1983, is to be transferred from the Chester County Department of Social Services to the Cheyenne River Sioux Indian Tribe provided that such transfer shall not occur prior to sixty (60) days from the date of this order. The Petitioner shall arrange and coordinate such transfer with the Tribal Indian Child Welfare Coordinator, Joe Lends His Horse. The transfer of custody shall take place in Chester County, South Carolina, with the Tribe to assume all responsibility for the protection, welfare, safety and well-being of these children upon the effective date of the transfer.

(2). Prior to the transfer of said custody to the Tribe, the Tribe and Department of Social Services are directed to confer and agree upon a treatment plan for the children relative to the impact of removal whenever the Tribal Court determines to remove the children from their present foster homes. The responsibility for providing services under the plan shall be shared by the Tribe and Department of Social Services.

(3). That the Chester County Department of Social Services pay the sum of Five Hundred and no/100 ($500.00) Dollars to Richard M. Steele for his services as Guardian ad Litem of the minor children.

AND IT IS SO ORDERED.

/s/ Thomas Barrineau, Jr.
Thomas B. Barrineau, Jr.
Family Court Judge
Sixth Judicial Circuit

Winnsboro, South Carolina
April 5th, 1989

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

Chester County Department of Social Services,
.....Petitioner-Respondent,

v.

Joe L. Coleman, Phyllis Coleman, and Dorothy Clark, Indian Child Welfare Coordinator of the Cheyenne River Sioux Juvenile Court,
.....Respondents.

IN RE: Billie Jo Morrison, DOB: 1-1-78, Tara Morrison, DOB: 5-9-79, Jacqueline Coleman, DOB: 10-26-81, Heather Coleman, DOB: 1-31-83, all minor children under the age of Eighteen (18) years,

of whom

Billie Jo Morrison, Tara Morrison, Jacqueline Coleman and Heather Coleman, by and through their duly appointed Guardian Ad Litem, Richard M. Steele

are .....Appellants.

Appeal From Chester County
Thomas B. Barrineau, Jr., Family Court Judge

Opinion No. 1219
Heard April 13, 1988 – Filed September 26, 1988

REVERSED AND REMANDED

Robert Marshall Jones, of Rock Hill, for appellants.

Claude S. Coleman, of Chester, for petitioner-respondent.

Tee Ferguson, of Spartanburg; Bruce R. Greene and Elizabeth Meyer, both of Boulder, Colorado; and George M. Hearn, Jr., of Conway, for respondents.

PER CURIAM: This appeal arises from a child placement proceeding. It involves the application of the federal Indian Child Welfare Act.[1]

Billie Jo Morrison, Tara Morrison, Jacqueline Coleman, and Heather Coleman are the minor children of Joe and Phyllis Coleman. Phyllis and her daughters are enrolled members of the Cheyenne River Sioux Tribe in South Dakota. Billie Jo and Tara are her daughters by a previous marriage. Jacqueline and Heather are her daughters by Joe Coleman, her present husband. Mr. Coleman is a retired military man. He is a black man, not an Indian.

In November, 1983, the Chester County Department of Social Services commenced an action to remove the children from the Coleman home and transfer their custody to the Department. After a removal hearing, the court found that Billie Jo and Tara had been physically abused, and that Jacqueline and Heather were threatened with substantial harm if allowed to remain in their parents' custody. The court ordered the children to remain in custody of the Department of Social Services. In May, 1984, the Department filed a petition to return the children to their parents. Subsequently, the Department

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[1] Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. sections 1901-1963).

amended that petition to allege the children had been physically and sexually abused by the parents. After a hearing, the court found that the children had been sexually abused and ordered them to be placed with the corresponding Department of Social Services in South Dakota. On an appeal from that order, the Supreme Court remanded the case to the family court to determine the proper placement of the children.

The parties to the placement hearing were the Department; the parents; the children, represented by their guardian ad litem, Cindy Hord; Bob and Stella Redwine, the foster parents of the children; and Dorothy Clark, as the Indian Child Welfare Coordinator of the Cheyenne River Sioux, and also as the representative of the Cheyenne River Sioux Tribe. Clark took the position, on behalf of herself and the tribe, that the children's placement is controlled by the Indian Child Welfare Act, which requires the South Carolina court to transfer the case to the jurisdiction of the Cheyenne River Sioux Juvenile Court, sitting in South Dakota. The family court agreed and ordered custody and jurisdiction to be transferred to the tribal court. The children appeal that ruling. We reverse and remand.

When Congress enacted the Indian Child Welfare Act, it had two main goals: (1) protecting the best interests of Indian children, and (2) promoting the stability and security of Indian tribes and families. To achieve these objectives, the Act sets minimum federal standards for child placement proceedings in order to prevent the unwarranted separation of Indian children from family and tribal heritage. The Act is based on the assumption that protection of the Indian child's relationship to the

tribe is in the child's best interest. 25 U.S.C. Section 1902; *A. B. M. v. M. H. & A. H.*, 651 P.2d 1170 (Alaska 1982) *cert. denied sub nom. Hunter v. Maxie*, 461 U.S. 914 (1983); *In re Adoption of K. L. R. F.*, 356 Pa. Super. 555, 515 A.2d 33 (1986) *appeal dismissed*, ___ Pa. ___, 533 A.2d 708 (1987).

Under the Act, if the tribe or either parent of an Indian child petitions for transfer of the proceeding to the tribal court, the state court cannot proceed with the placement of an Indian child living outside a reservation, without first determining whether jurisdiction of the matter should be transferred to the tribe. 25 U.S.C. Section 1911(b). The statute provides:

> In any State court proceeding for the foster care placement of . . . an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon petition of either parent . . . or the Indian child's tribe. . . .

25 U.S.C. Section 1911(b). In other words, transfer to the jurisdiction of the tribe is mandatory in the absence of good cause to the contrary.

The phrase "good cause to the contrary" is not defined in the Act itself. However, the legislative history of the statute states that the use of the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child. H.R. REP. No. 1386, 95th Cong. 2nd Ses. 21, *reprinted in* 1978 U.S. CODE CONG. &

ADMIN. NEWS 7530, 7544. Federal guidelines interpreting the Act define "good cause to the contrary" as including, but not limited to cases where (1) the proceeding is at an advanced stage when the petition to transfer is received and the petition is not promptly filed after receipt of notice; (2) the Indian child is over the age of twelve and objects to the transfer; (3) evidence necessary to decide the case cannot be adequately presented to the tribal court without undue hardship to witnesses and parties; (4) the parents of an Indian child over the age of five are not available and the child has had little or no contact with the child's tribe or members of the child's tribe. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67583, 67591 (1979) (Not codified). An earlier version of these guidelines also included the case where the Indian child had not resided on the reservation for a significant period of time. *See* Recommended Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 24000, 24001 (1979). Case law also suggests that "good cause to the contrary" includes the absence of a tribal mechanism for handling child custody matters. *In the Matter of the Appeal in Pima County Juvenile Action No. S-903*, 130 Ariz. 202, 635 P.2d 187 (Ct. App. 1981) *cert denied*, 455 U.S. 1007 (1982). The burden of establishing good cause to the contrary is on the party opposing the transfer. 44 Fed. Reg. 67583, 67591 (1979). The third element of the guidelines has been applied to deny transfer due to considerations of *forum non conveniens*, such as availability of witnesses and access to proof. *In the Interest of J. R. H. and M. J. H.*, 358 N.W.2d 311 (Iowa 1984).

In this case, the family court failed to consider the various factors which may constitute "good cause" under the statute. This was error. What little we are able to glean from the record indicates that a biological parent of the two older girls, both of whom are over five years of age, may be unavailable; that none of the children has had any contact with the tribe or has resided on the reservation for a significant period of time; and that the material witnesses and evidence relating to placement are in South Carolina, not South Dakota. These factors, together with evidence that removal of the children would be disruptive and detrimental to their best interests, may well constitute "good cause" for the family court to retain jurisdiction of the case.

Because we are unable to make this factual determination on the record before us, we reverse and remand for a redetermination of the issue. In deciding if "good cause to the contrary" exists or not, the family court should make specific findings on the factors outlined above.

REVERSED AND REMANDED.

/s/ Illegible

/s/ Curtis G. Shaw, J.

/s/ Randall T. Bell, J.

STATE OF SOUTH CAROLINA COUNTY OF CHESTER	)	IN THE FAMILY COURT
Chester County Department of Social Services, Petitioner, vs. Joe L. Coleman, Phyllis Coleman and Dorothy Clark, Indian Child Welfare Coordinator of the Cheyenne River Sioux Juvenile Court, Respondents. IN RE: Billie Jo Morrison, DOB: 1-1-78 Tara Morrison, DOB: 5-9-79 Jacqueline Coleman, DOB: 10-26-81 Heather Coleman, DOB: 1-31-83, all minor children under the age of eighteen (18) years.	)	ORDER Case No. 83-DR-12-400

THIS MATTER came to be heard before me in Chester, S. C., on October 1st, 1986. Present at the hearing was Claude S. Coleman, Assistant Solicitor, on behalf of the Petitioner. The Respondents were present represented by their attorney, Mr. Tee Ferguson. Mr. Lamar H. Kelsey, III was present as attorney for the four minor children; Mrs. Cindy Hord, as Guardian ad Litem for the minor children; Dorothy Clark, as Indian Child Welfare Coordinator and representative of the Cheyenne River Sioux Indian Tribe; and Robert M. Jones on behalf of the foster parents.

The action today is before me by Order of Remand issued by The Supreme Court of South Carolina on April 4th, 1986, for the limited purpose of determining proper foster care placement for the four minor children. Also, before me is a Motion for Randy L. Miller, Esquire to be relieved of his representation of the Respondent, Phyllis Coleman. After consideration of the entire record including all testimony, exhibits, recommendations, memorandums of law, and arguments of counsel, I make the following findings of fact.

FINDINGS OF FACT

That the Respondent, Phyllis Coleman, is agreeable to Mr. Randy L. Miller being relieved as her attorney and being represented by Mr. Tee Ferguson. There is no conflict of interest in Mr. Ferguson representing both Respondents at this stage in the proceedings.

All four children are enrolled members of the Cheyenne River Sioux Indian Tribe. The Tribe has indicated their desire to receive jurisdiction over the children for the purposes of placement in a temporary and/or permanent foster or adoptive home. The Tribal Juvenile Court places its first priority for placement of removed children with relatives, friends, or other tribal members living on the reservation who shall raise the children with due regard to Tribal or family customs.

All evidence presented to this Court indicates the children are in excellent foster homes, have adapted relatively well to their present surroundings, and are being provided the home atmospheres and services needed. Such is necessary to allow them to overcome the abuse

with its accompanying emotional and psychological harm inflicted upon them by the Respondents. In addition, I am aware of the attachment and bonds which have developed between the children and their respective foster parents, and the potential harm to the children by removing them from their present surroundings. However, the record indicates the availability of various social services to children on the Reservation by both state and federal agencies necessary to assist in the treatment of physically and sexually abused children.

The Court must consider the mandate placed upon it by the *Indian Child Welfare Act of 1978,* as set forth in *25 U.S.C.S. Section 1901 et. seq.*. Congress in recognizing the special relationship between the United States and the Indian Tribes and their members, stated that the policy of this Nation is " . . . to promote the stability and security of Indian Tribes and families . . . by placing children removed from their families . . . in foster or adoptive homes which will reflect the unique values of Indian culture." *Section 1902.* Congress has responsibility for the protection and preservation of Indian tribes and their resources and recognized "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." *Section 1901 (3).*

Since their initial removal in October, 1983, these children have undergone various foster care placements. Expert testimony presented indicates moving the children again may be harmful and disruptive to them. However, a change in placement is better now than at some later time when the children may be even more attached and bonded to their foster homes. In the long term, it is in the children's best interest to be returned to the Tribe for

placement in an environment which reflects the unique values of their Indian background and hopefully offers the opportunity for lasting and permanent homes.

The issue of transfer of jurisdiction to the Tribal Court first came before the Court on December 4th, 1984. At that time the Court determined in its Order dated December 13th, 1984, there was "good cause for this Court to retain jurisdiction until all allegations of actual and threatened abuse to these children which occurred within this jurisdiction are resolved." Such has now taken place. This Court finds "good cause" no longer exists for this Court to retain jurisdiction for placement proceedings of the four minor children.

I further find the participation of Robert M. Jones, as attorney for one or more of the foster parents of the involved children, was limited to participation at the merit hearing. Although allowed to be present at this hearing, I find it is not appropriate for him to participate or call witnesses.

Also, this Court is aware that in a separate legal action unrelated directly to this one, the Petitioner has commenced a proceeding for the termination of parental rights of the Respondents. This Court does not intend its ruling in the matter before it today to affect the termination action in any way. Therefore,

IT IS ORDERED:

(1). That Randy L. Miller, Esquire be allowed to withdraw from representation of Phyllis Coleman and Tee Ferguson, Esquire be her attorney of record in this matter.

(2). That legal custody of the four minor children, to-wit: (a) Billie Jo Morrison, born January 1, 1978; (b) Tara Morrison, born May 9, 1979; (c) Jacqueline Coleman, born October 26, 1981; and (d) Heather Coleman, born January 31, 1983, is hereby transferred to the Cheyenne River Sioux Indian Tribe effective upon transfer of physical control and custody of the children to a representative of the Tribe. Within twenty (20) days from the filing of this Order the Petitioner shall arrange and coordinate such transfer with the Indian Child Welfare Coordinator, Mrs. Dorothy Clark. The transfer of custody shall take place in Chester County, South Carolina, with the Tribe to assume all responsibility for the protection, welfare, safety and well-being of these children upon receiving physical custody and control.

AND IT IS SO ORDERED.

I verily believe this Order to be in compliance with Rule 27 (c) of the Rules of Practice for the Family Courts.

November 10th, 1986.

/s/ Thomas B. Barrineau
THOMAS B. BARRINEAU
FAMILY COURT JUDGE
SIXTH JUDICIAL CIRCUIT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM CHESTER COUNTY
HONORABLE THOMAS B. BARRINEAU, JUDGE
CASE NO. 83-DR-12-400

Chester County Department of Social Services, Petitioner, – Respondent against Joe L. Coleman and Phyllis Coleman, Respondents. IN RE: Billie Jo Morrison, DOB: 1-1-78 Tara Morrison, DOB: 5-9-79 Jacqueline Coleman, DOB: 10-26-81 Heather Coleman, DOB: 1-31-83, all minor children under the age of eighteen (18) years. Of whom Billie Jo Morrison, Tara Morrison, Jacqueline Coleman and Heather Coleman, by and through their duly appointed Guardian ad Litem, Cynthia S. Hord are Appellants	ORDER

This matter is before the Court upon the Petition of the Chester County Department of Social Services, Respondent, requesting remand of the issue of foster care placement of the four minor children to the trial court. Upon reading the Petition and on motion of Assistant Solicitor Claude S. Coleman, Attorney for the Petitioner-

Respondent and with the consent of Lamar H. Kelsey, III, attorney for the Appellants,

IT IS THE ORDER OF THE COURT that the issue of placement of the minor children provided for in paragraph three of the Order of the Honorable Thomas B. Barrineau dated February 28, 1986, be remanded to the Family Court of the Sixth Judicial Circuit for the Petitioner to show cause why placement as therein ordered is not appropriate or in the children's best interest.

Columbia, South Carolina
April 4, 1986.

J. B. NESS, CHIEF JUSTICE
For the Court
By /s/ Clyde N. Davis, Jr.
Clerk

I MOVE:

/s/ Claude S. Coleman
Assistant Solicitor, Claude S. Coleman for the Respondent.

I CONSENT:

/s/ Lamar H. Kelsey, III
Lamar H. Kelsey, III, for the Appellants.

STATE OF SOUTH CAROLINA	)	IN THE
	)	FAMILY
COUNTY OF CHESTER	)	COURT
Chester County Department of Social Services,	)	
Petitioner,	)	
vs.	)	
Joe L. Coleman and Phyllis Coleman,	)	ORDER
Respondents.	)	
IN RE:	)	
Billie Jo Morrison, DOB: 1-1-78	)	
Tara Morrison, DOB: 5-9-79	)	
Jacqueline Coleman, DOB: 10-26-81	)	
Heather Coleman, DOB: 1-31-83,	)	
all minor children under the age of eighteen (18) years.	)	

THIS MATTER came to be heard before me in Chester County, S. C., on February 13th, 1986. Present at the hearing was Claude S. Coleman, Assistant Solicitor, on behalf of the Petitioner, the Respondent, Phyllis Coleman, with her attorney, Randy L. Miller, the Respondent, Joe L. Coleman, with his attorney, Tee Ferguson, the Guardian ad Litem for the four (4) minor children, Cynthia S. Hord, Lamar H. Kelsey, III, attorney for the minor children, and Robert M. Jones, attorney for the foster parents.

The Petitioner first initiated action involving the Respondents by its Order, Rule to Show Cause, Notice and verified Petition on November 9, 1983, whereby under Ex Parte Order emergency custody of the four (4)

minor children was granted to Petitioner due to an imminent risk of harm for the physical well-being of the children. After following proper judicial procedures, a merit hearing was held before this Court on December 22, 1983, with all parties properly represented. At that hearing a judicial determination was made that Billie Jo Morrison and Tara Morrison were physically abused children and that Jacqueline Coleman and Heather Coleman were threatened with substantial harm if allowed to remain in custody of the Respondents. All four (4) children were ordered to remain in custody of the South Carolina Department of Social Services for their protection and welfare. Thereafter, a judicial review hearing was scheduled for June 4, 1984, wherein the Petitioner proposed to maintain custody of all children and place the two younger children in the home with the Respondents under supervision of the Petitioner. Prior to said hearing the Petitioner received allegations of additional abuse and threat of harm endangering the minor children. The Petitioner was granted a continuance for further investigation of abuse and threat of harm to the children. As a result of further investigation of Petitioner and law enforcement authorities, the Respondents were arrested and indicted for various criminal charges involving sexual abuse of the two older children. The Respondents moved under the *Indian Child Welfare Act of 1978*, as amended, to transfer jurisdiction of all proceedings involving the custody of the minor children to the Cheyenne River Sioux Tribal Juvenile Court. This Motion was denied and jurisdiction retained in this Court by Order of the Honorable Berry L. Mobley, Family Court Judge of the Sixth Judicial Circuit, dated December 13, 1984. As set

forth in this Order jurisdiction was retained in the State Court as provided for under the provision of the Federal Act. Thereafter, Petitioner filed an amended Petition on September 19, 1985, alleging sexual abuse of the children by the Respondents and that such abuse creates a continuāl threat of harm to the children if placed with the Respondents. The merit hearing on these allegations was initially scheduled for October 2nd, 1985, but continued on Motion of the Respondents as set forth in my Order dated October 14, 1985. The Respondents have answered and all written motions have been disposed of in the prior rulings of this Court. Prior to commencing the testimony, Mr. Ferguson orally moved to transfer venue to the U. S. District Court. The motion is denied at this time, but Respondent's right to do so in the future if allowed by Federal law is reserved to them. Respondent's motion to sequester witnesses was granted. After careful consideration of the entire record including all evidence before the Court, I find as follows:

FINDINGS OF FACT

This Court has jurisdiction of the subject matter and all parties to the action. The parties and issues are properly before the Court.

There was extensive testimony in this case of which a substantial portion came from medical experts. The four minor children were removed from the home of the Respondents on November 9th of 1983 at which time their ages were: Billie Joe-five years, ten months; Tara-four years, six months; Jacqueline-two years, one month; and Heather-eleven months. The removal was due to a

judicial finding of severe physical abuse by the Respondents of the two older children and a threat of harm to the two younger children. Shortly after the initial removal, the two older children were placed with foster parents and the younger children in a different foster home. At no time have the children been in the same foster home. The only unsupervised visitation of the children with the Respondents was an overnight visit during Christmas, 1983. The respective foster homes are approved and licensed by the State of South Carolina.

After the initial indication of sexual abuse of Billie Jo, she and Tara were examined by a medical doctor in Rock Hill. This Dr. testified as an expert witness in the field of Family Practice and was called by the Respondents. Her pelvic examination of both children revealed physical findings and injury consistent with vaginal penetration and sexual abuse.

The other expert, Dr. Sara E. Schuh, is Director of the Child Abuse Center and Professor of Pediatrics at the Medical University of South Carolina, and testified as an expert in the field of Pediatrics with extensive experience in the field of child sexual abuse. Billie Jo and Tara were examined by Dr. Schuh on November 26th, 1984, with the younger children being examined approximately two weeks later. In all four children were found physical evidence of vaginal penetration by foreign objects. There were healed lacerations of the hymen. The scars were well healed which indicated an injury of more than eight weeks. There was hyper-pigmentation in the genital area which is a symptom of irritation consistent with digital and partial penetration of the vagina. The physical injuries to the three older children were consistent with the

medical history given the Doctor by the three older girls. In their medical history, Billie Jo, Tara and Jacqueline told in explicit details of having been sexually abused by the Respondents. At the time of her examination, Heather was non verbal but Dr. Schuh's physical findings indicate she likewise had been sexually abused.

The children related the details in such description that they could not have been programmed to give such information. It is not unusual for sexually abused children of this age to delay for a period of six months or more before telling of the abuse. It is necessary for them to develop trust in someone after leaving such an atmosphere before disclosing the abuse. Likewise, children of this age may even indicate a desire to return to such a home situation until they can develop a home atmosphere somewhere else. Abuse victims, in spite of all, usually care about their parents and do not want to see them get in trouble.

The nature of the children's injuries indicate that it is unlikely they were caused by a single sexual episode. It indicates multiple occasions or an on-going situation.

Dr. Schuh testified over the past several years she has examined over one thousand children who were the victims of abuse. She was unaware of any case where a child imagined such events of abuse in order to live in a different environment.

Here, we have three children, who relate in graphic and explicit detail a medical history of physical and sexual abuse by the Respondents. A highly qualified medical expert finds evidence of previous physical injury to these

children consistent with their stories and likewise indicative of severe sexual abuse. In addition, the older children related by word and demonstration with anatomically correct dolls details of their abuse to the Social worker and Guardian ad Litem.

I find the evidence of all four children having been sexually abused by both Respondents to be overwhelming. The evidence is clear and convincing that these children cannot be protected from further sexual abuse if in custody of the Respondents. A return of custody of these children to the Respondents will assuredly result in serious emotional and physical injury to the children.

In the event the Respondents attend and comply with all counseling, testing and therapy sessions recommended to them, the Petitioner shall schedule and arrange for periods of closely supervised visitation with the children.

This record indicates that all four minor children are enrolled members of the Cheyenne River Sioux Indian tribe located in South Dakota. This Court recognizes the stated policy of the Congress of the United States as established by the *Indian Child Welfare Act of 1978* to promote the welfare and stability of Indian tribes and families. Further, it is policy under the Act that the placement of Indian children be in foster or adoptive homes which will reflect the unique values of Indian culture.

The Guardian ad Litem and Attorney for the children served in their respective capacities by appointment of this Court. Each has expended significant time and effort in their duties and is entitled to be compensated for their efforts. Since this action was commenced, each has spent

substantial time in Court proceedings as well as preparation for same.

Therefore,

IT IS ORDERED:

(1). That care, custody and control of the minor children, to-wit: Billie Jo Morrison, Tara Morrison, Jacqueline Coleman and Heather Coleman, continue with the Petitioner or other proper authority due to the danger of further abuse if returned to custody of the Respondents.

(2). That visitation privileges of the Respondents with the minor children are continued under close supervision of the Petitioner. The Respondents shall attend and complete such testing, counseling, therapy and treatment as directed by the Petitioner necessary to evaluate if the Respondents can resume custody in the future. All testing will be done at expense of the Respondents.

(3). The Petitioner shall transfer the minor children along with copies of all files and records of these proceedings to an appropriate corresponding agency in a state near the tribal lands of the minor children for placement according to the policies established by the *Indian Child Welfare Act of 1978*, as amended. PROVIDED, that if the Petitioner believes such placement is not in the children's best interest or appropriate under said Act, it may initiate proceedings in this Court within thirty days from the filing of this Order to show cause why the children should not be placed as above set forth.

(4). That the South Carolina Department of Social Services pay Cynthia S. Hord, 111 Dogwood Lane,

Chester, S. C., the sum of One Hundred Fifty and No/100 ($150.00) Dollars for her services as Guardian ad Litem and pay Lamar H. Kelsey, III, Attorney at Law, P. O. Box 433, Chester, S. C., the sum of Two Hundred Fifty and No/100 ($250.00) Dollars for his representation as attorney for the children.

AND IT IS SO ORDERED.

I verily believe this order to be in compliance with Rule 27 (c) of the Rules of Practice for the Family Courts.

s/ _____
THOMAS B. BARRINEAU
FAMILY COURT JUDGE
SIXTH JUDICIAL CIRCUIT

February 28, 1986.
Winnsboro, South Carolina